89-1524

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

J.P. SCHERMERHORN, et al.,

Petitioners,

vs.

ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

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QUESTIONS PRESENTED FOR REVIEW

Has due process of law, as provided for in the Constitution of the United States and the State of Illinois been accorded to Petitioners, licensed realty managers, found guilty of commingling funds, for buying with realty management money, sound commercial paper, keeping the interest, with the fund owner's oral consent to the buying and the keeping of the interest, when:

1. The only evidence of Petitioners' guilt was that Petitioners purchased such paper with money from the management account and with the fund owner's oral consent to the purchase and the keeping of interest which paper after purchase was held in the management account; there is no other evidence of alleged commingling in the Record.

2. The Illinois Appellate Court held the reason given for the guilty of commingling finding of the Defendant Department of Registration and the trial court to be erroneous but nevertheless found Petitioners guilty of commingling on a new charge, and not for the reason given by the said Department and the trial court; Petitioners were found guilty for an entirely different reason not presented at trial, namely, no consent of the fund owner to keep the interest; a charge shown in the Record to be untrue as Petitioners had the oral consent of the fund owner to make the purchase and keep the interest, Petitioners (Schermerhorns) have never had an opportunity to respond to such new charge first made in the Appellate Court. Do we not have a total lack of due process for three reasons; first, nothing in the record shows Petitioners commingled. Second, the Appellate Court found Petitioners guilty of commingling for an act not shown in the Record that never occurred. Third, Petitioners have never had an opportunity to respond to the charge on which they were found guilty.

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DECISION BELOW

A copy of the Illinois Appellate Court opinion finding Petitioners guilty of commingling is attached as Appendix A. A Petition for a Rehearing of such opinion was filed and denied on August 15, 1989 (Appendix F). A Petition for Leave to Appeal from that court to the Illinois Supreme Court was filed and denied on December 5, 1989, by the Illinois Supreme Court.

Petitioners in this Court are John P. Schermerhorn and J.P. Schermerhorn Co.

Respondents in this Court are the Department of Registration and Education of the State of Illinois, herein sometimes called the Department, and Gary L. Clayton, Director of said Department.

JURISDICTION IN THIS COURT

The decision of the Illinois Supreme Court denying Petitioners' Petition for Leave to Appeal to the Illinois Supreme Court was entered on December 5, 1989. This Petition for Certiorari is timely filed as it was mailed to the Clerk of this Court within ninety (90) days of the Illinois Supreme Court's decision denying leave to appeal to the Illinois Supreme Court. Certiorari is authorized by 28 U.S.C. Sec. 1254.

STATUTE INVOLVED

The Illinois Real Estate License Act of 1983, still in effect in the State of Illinois, provides as to the Illinois Department of Registration and Education in Chap. 111, § 5818(e)(12) 1987 Illinois Revised Statutes:

> "The Department may—impose a civil penalty . . . on any licensee—where the licensee—is found guilty of . . . (e)(12) commingling the money or property of others with his own."

STATEMENT OF THE CASE

This case originated when the Respondent, Illinois Department of Registration and Education, filed a two count complaint against J.P. Schermerhorn and J.P. Schermerhorn Co., hereinafter called Schermerhorns, Petitioners herein, alleging in Count I Schermerhorns were guilty of commingling (Defendants dismissed Count II). As to Count

I, the Defendants claimed Schermerhorns were guilty of commingling because they invested $75,000.00 in Schermerhorns' rental management account in sound commercial paper without the written consent of the owner of such $75,000.00, although Schermerhorns had such owner's ORAL CONSENT given around January 14, 1980, to the investment and to Schermerhorns keeping the interest (R. 116-118, 166, 181, 129, 130, 55 and Appendix B) when letters of intent to invest were mailed by Schermerhorns to certain owners of monies in Schermerhorns' management account. After the investment of the $75,000.00, the certificate of purchase was held in the management account. The Department contended below that the mere act of purchasing constituted commingling even though the purchased certificate was held in the same management account; both Defendants' attorneys (W.K. Kane for the Attorney General, and John Goldberg, attorney for the Department of Registration) argued and contended at all stages of the case that *the mere act of purchasing constituted commingling.*

John M. Goldberg saying the following in lines 2-6 of page 202 of the Record:

> "AND I WOULD SUBMIT TO THE BOARD THAT WHEN THAT MONEY WAS TRANSFERRED FROM THE MANAGEMENT ACCOUNT AND PLACED IN A COMMERCIAL PAPER INVESTMENT IN THE NAME OF J.P. SCHERMERHORN AND COMPANY, THAT WAS COMMINGLING."

The Appellate Court disagreed with Respondent's said contention that the mere purchase constituted commingling; how could it be in view of the above Illinois statute but proceeded nevertheless to hold Petitioners guilty of commingling; it so held for a new reason not argued below, namely, because Schermerhorns kept as their own

property (see Appellate Court opinion at App. 7) the interest generated by their clients $75,000.00 without the clients' consent; actually there WAS ONLY ONE CLIENT, namely, Schermerhorns' attorney who had orally consented (R. 116-118, 166, 181, 129, 130, 55 and Appendix B), to Schermerhorns' purchase of the $75,000.00 and to Schermerhorns keeping the interest generated. Petitioners have never had an opportunity to answer this new charge which originated in the Appellate Court opinion. It is Schermerhorns' view that an oral consent is binding. The Department's witness Lynn testified he saw Schermerhorns' attorney at his office before the case was started (early 1985), and Schermerhorns' attorney could not recall giving his consent, the note was purchased April 11, 1980 and the Department at no time cited any authority holding such a consent must be in writing. Furthermore, the investment (purchase) in question was made April 11, 1980, when the Real Estate Brokerage Act of 1921 was still in effect, such act said nothing about such an agreement having to be in writing (see R. 369 and Appendix C hereto attached showing old and new relevant act).

REASONS FOR GRANTING THE WRIT

The Fifth and the Fourteenth Amendments to the Federal Constitution provide that no person shall be deprived of "life, liberty or property" without due process of law, the Fourteenth Amendment being applicable to the states.

In the instant case, Petitioners have not only been deprived of procedural due process of law but also of substantive due process.

The 1970 case of *Whitfield v. Simpson*, 312 F.Supp. 889 at page 894 says:

> "The test of whether or not one has been afforded procedural due process is one of fundamental fairness in the light of the total circumstances."

To the same effect is *Buttny v. Smiley*, 281 F.Supp. at 280.

What is fair about punishing real estate managers for:

1. investing management funds in sound commercial paper with the fund owner's oral consent.
2. investing management funds in sound commercial paper and keeping the interest when they had the fund owner's consent to so invest and so keep the interest (Appendix B, App. 10) and when they have never been allowed to respond to such charge, it having been first made in the Illinois Appellate Court.
3. commingling, when there is not an iota of evidence in the Record showing Petitioners commingled other than the oft-stated claim of a Board staff attorney saying legal commingling occurred when sound commercial paper was purchased with management money, a wholly illogical statement as the Appellate Court recognized.

If you ever had a holding more fundamentally unfair than the instant guilty holding, I don't recall one. The Appellate Court found the reasoning as to commingling below erroneous *but* found Petitioners guilty on a new set of alleged facts, which new set of facts are nowhere even hinted at in the Record. Clearly the above total lack of fundamental fairness shows procedural due process of law was not accorded Petitioners. In addition, Petitioners were deprived of substantive due process of law.

Volume 11 A, page 365 of Illinois Law & Practice says:

> "In its most basic sense, due process is the protection of the individual from arbitrary action. Arbitrary action in the due process sense means action that is wilful and unreasonable; arbitrary action is synonymous with unreasonableness and thus due process becomes a test of reasonableness. Thus the purpose of the constitutional requirements as to due process of law is to protect every person or citizen in his personal and property rights against the arbitrary action of public officials. . ."

Here we have a perfect example of arbitrary action by a public official: The Board's attorney, Mr. Goldberg, contending as he did in lines 2-6 at page 202 of the Record (heretofore set forth in caps on page 3), that the *mere purchase* was commingling, a wholly unsound statement, yet although Petitioners lawyer wrote each member of the defendant's board that this couldn't possibly be true (see Record 367). The alleger's prestige with his own Board was so great the Board found Schermerhorns guilty of commingling! Such a finding shows the reason for the Fifth and Fourteenth Amendments giving this Court the power to protect ordinary citizens from arbitrary actions of public officials.

First Reason For Granting The Writ

There are a number of reasons why this Court should grant certiorari, a writ, which as stated above, protects a citizen from arbitrary actions of public officials. See *Lipp v. Board of Education*, 470 F.2d 802 (7th Cir. 1972).

The cardinal or ultimate test of the presence or absence of due process of law is the presence or absence of the rudiments of fair play. See *Whitfield v. Simpson*, 312 F.

Supp. 889 at page 894 (D.C. Ill.); *Buttny v. Smiley*, 281 F.Supp. 280, 288.

In *People v. Dees*, 81 Ill.App.3d 35 at page 37, our Illinois Appellate Court said as to due process:

> "In its most basic sense, however, it is the protection of the individual from arbitrary action."

To the same effect is *Ohio Telephone Co. v. Public Utilities Co.*, 301 U.S. 292, 302, 81 L.Ed. 1093, 1100 and *Ashcraft v. Board of Education*, 83 Ill.App.3d 938, 940, where it is pointed out that author Bernard Schwartz in his book on Constitutional Law, pages 165, 166 (MacMillen 1972) also concludes that due process really becomes a test of reasonableness of the decision or act in question.

More specifically can we not logically contend, in line with prior holdings of this Honorable Court, that:

a) As held in *Jackson v. Virginia*, 443 U.S. 307, 314:

> "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201; *Presnell v. Georgia*, 439 U.S. 14."
>
> "A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, we held in the *Thompson* case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. See also *Vachon v. New Hampshire*, 414 U.S. 478; *Adderley v. Florida*, 385 U.S. 39; *Gregory v. Chicago*, 394 U.S. 111; *Douglas v. Buder*, 412 U.S. 430."

b) As in *Cole v. Arkansas*, 333 U.S. 196 (1948), where petitioners were convicted at trial of one offense but their convictions were affirmed by the

Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed, Mr. Justice Black wrote for a unanimous Court:

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . ." (page 201)

c) Likewise in *In Re Oliver*, 333 U.S. 257, 273, this court said through Justice Black:

> "Failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law."

That the decision below of both the Department of Registration, the trial court and also the Appellate Court are unsound can be seen from:

1. As to the Department of Registration and the trial court, the Appellate Court itself held their conclusions *erroneous* as to how commingling occurred. See the first paragraph on App. 7 of the attached Appellate Court opinion.

2. As to the Appellate Court, while it held the said conclusion of the said Department and trial court erroneous it went on to hold that when the Schermerhorns kept the interest from the $75,000.00 *without* the consent of all of the owners of the $75,000.00 that was commingling WHEN THE FACTS CLEARLY ARE:

a. There was only one owner of the fund (see Appendix B) and

b. When the Record clearly shows Schermerhorns had the oral consent of such fund owner to the making of the investment and keeping the interest (see Appendix B attached).

Second Reason For Granting The Writ

The Appellate Court in the last paragraph on App. 6 of its attached opinion correctly states "the issue now is . . . whether the manifest weight of the evidence supports the Department's decision." The decision below is not only not supported by the manifest weight of the evidence, *there is not an iota* of evidence in the Record that supports it, when Petitioners' attorney attempted to point this out to the trial judge, she said she would not permit arguments on the condition of the Record, but would follow the Department's recommendations. That the Appellate Court did the same and DID not read the relevant section of the Record is apparent from its conclusion that *more than 1 person owned the $75,000.00 fund and that all of the owners of such fund did not consent*, when the Record shows this to be untrue. See Appendix B.

Third Reason For Granting The Writ

This case involves an administrative agency of the State of Illinois, the Illinois Department of Registration and Education. If it believes, as it apparently does (see Goldberg argument heretofore set out on page 3), that the mere purchase of a 100% sound security like a U.S. bond by one of the thousands of building managers in the State of Illinois, with the security being held by the purchasing entity, makes a manager guilty of commingling in spite of the statutory definition of commingling, then such a belief, affecting as it does the thousands of Illinois property managers, should be reviewed by the Court. This is especially so where you have another state agency, the Illinois courts, holding such contention to be wrong. Such a conflict places real estate managers in a difficult position, are they, going to act on the Department's belief

or be subject to discipline by the Department which holds such an illogical view.

Petitioners indeed stand in need of the protection of this Court from the arbitrary, illogical act of Respondent Department of Registration and Education.

In conclusion then, do we not have a total lack of reasonableness and therefore a total lack of due process in the Appellate Court opinion, both substantive and procedural; nothing in the Record supports either the Department or the court's decision. Schermerhorns, as stated, have never had an opportunity to reply to the Appellate Court's holding *that commingling occurred when Schermerhorns purchased without the consent of all of the owners of the $75,000.00 and kept the interest.* In fact, Petitioners had the oral consent of the owner of the fund and there was only one owner.

The Appellate Court's decision is therefore erroneous as it is hinged on facts not in the Record and which the Record shows to be untrue; the decision is therefore wholly lacking in reasonableness and due process.

The ordinary rule as to the review of the decision of an administrative body is, it will be affirmed if a reasonable man on reading the Record would have come to the same decision. HERE *no reasonable* man on reading the instant Record would come to the same conclusion because:

1. There is nothing in the Record supporting the Appellate Court's basis for its opinion, that there was more than one owner of the fund and that all of the owners of the $75,000 fund did not consent to the investing and the keeping of the interest.
2. There is nothing whatsoever in the Record that shows commingling occurred.

CONCLUSION

Petitioners respectfully ask that a Writ of Certiorari issue so that the above patently erroneous decision can be reviewed and the conflict between the above two state agencies as to commingling be resolved.

The logic of such request is apparent as:

First, lawyers, bankers and realty managers today have a substantial interest in commingling, and the instant Appellate Court decision can only confuse them, as the State entity established to discipline managers is apparently functioning on unsound principles.

Second, Petitioners in the instant Appellate Court decision below sustained a total lack of due process, both procedural and substantive.

Third, the decision below that Petitioners commingled, is patently wrong (and I use the word advisedly) as while the Appellate Court reversed the Board and the trial court as to how commingling occurred, it then proceeded to find Petitioners guilty of commingling because the "OWNERS" of the fund DID NOT CONSENT, when the Record shows in numerous places there was only one owner and he consented. (See Appendix B and R. 181-2 lines 4-10, R. 129-30, R. 128 line 14, R. 116-8). There is not an iota of evidence in the Record that:

a. Petitioner's attorney was not the owner of the $75,000.00 fund.

b. That Petitioner's attorney did not consent to Petitioner's keeping the interest.

IT IS RESPECTFULLY SUBMITTED:

1. That if there ever was a case where due process of law is wholly lacking and certiorari should be granted, this is such a case as:

a. Here the Respondent agency of the State of Illinois disciplining real estate managers, disciplined Petitioner for commingling when the Record shows *not an iota of evidence supporting the charge* (the agency and the trial court all through the case contended the mere purchase constituted commingling and so argued). (See Attorney Goldberg's argument heretofore set out in caps on page 3).

b. The Appellate Court opinion held such contention erroneous, but proceeded to hold Petitioners guilty of commingling for a new reason, not argued or contended below, which new reason is *unsupported by any fact or evidence in the Record.*

c. Such conflict of opinion as to what constitutes commingling between the Appellate Court and the Respondent Agency affects thousands of realty managers, bankers and lawyers who are concerned with commingling.

2. An opinion wholly hinged on two untrue alleged facts not shown in the Record, should at least bear the scrutiny of this Court and Certiorari should accordingly be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Appellate Court of Illinois First District, Second Division

No. 1-88-0852

Second Division
June 27, 1989

J.P. SCHERMERHORN,
J.P. SCHERMERHORN & CO.,

Plaintiffs-Appellants,

v.

ILLINOIS DEPARTMENT OF REGISTRATION & EDUCATION, Gary L. Clayton, Director of the Department of Registration and Education, State of Illinois,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
The Honorable Sophia Hall, Judge Presiding.

JUSTICE SCARIANO delivered the opinion of the court:

The Illinois Department of Registration and Education (Department) found plaintiffs guilty of commingling funds held in a property management trust for the benefit of others, fined them $2,500.00, and placed their real estate licenses on probation for two years for having contravened certain provisions of the Real Estate Licensing Act. On

administrative review, the circuit court affirmed. Plaintiff now appeals, and the issue on review is whether the decision of the Illinois Department of Registration and Education was against the manifest weight of the evidence.

The Department brought a two-count complaint against plaintiffs alleging that they had violated Ill. Rev. Stat. 1983, ch. 111, par. 5818(e)(12) and requested the State Real Estate Administration and Disciplinary Board (Board) that the real estate broker's licenses of John P. Schermerhorn and the corporate real estate license of J.P. Schermerhorn & Co. (the company) be suspended, revoked, or that other appropriate discipline be imposed. The charges were (1) that plaintiffs commingled funds held in a property management trust for the benefit of others, and (2) that plaintiffs refused to rent an apartment to a prospective tenant because he was black. The Board issued findings of fact and conclusions of law, finding plaintiffs guilty of the commingling charge, but not guilty of the second charge. Plaintiffs have been represented throughout all of these proceedings by attorney Ross Welch.

Gilbert Lynn, chief audit supervisor for the Department, audited the books of plaintiff company, and, discovered that $75,000.00 had been withdrawn from the company's property management account and placed in a commercial paper investment in the name of J.P. Schermerhorn and Company. The company offered property management services to its customers and maintained a management account wherein monies collected in the course of rendering those services were deposited and held in trust. Lynn's audit further revealed that by taking funds from its property management account and investing them in commercial paper in the company's name, such investment had earned approximately $33,000.00 in interest from 1980 through 1983. Plaintiffs deposited the interest so earned into the company's operating account and credited it as

interest income; the commercial paper investment was recorded as cash in its property management account.

In response to Lynn's inquiry as to whether their clients had consented that plaintiffs purchase investments with their money and retain the interest earned, plaintiffs produced a letter, which they claimed had been sent to the affected clients and which they also claimed constituted their clients' assent that the company retain as its own the interest earned by the management account:

> "As we discussed for the real estate tax reserve account we will maintain a minimum amount each month to have on hand the total amount of taxes when they are due and payable through John Luecker.
>
> The bank has informed us that they are in a position to purchase commercial papers for these large reserves and the interest to be credited to our account. This information is to let you know that the interest earned by us will be used by us to maintain this account at all times * * *"

According to this letter, Lynn testified, the interest earned on the investment should have been deposited into the company's tax account for property management customers and not in the company's operating account.

Further, after the Department requested plaintiffs to furnish a clear and accurate breakdown of the ownership of the $75,000, plaintiffs sent the Department an affidavit stating that, notwithstanding the contents of the letters they sent to their clients, the $75,000 belonged entirely to Ross Welch, one of the property management account owners and the attorney for plaintiffs in this case. The affidavit further stated that Welch had consented to the company's use of his money. But when Lynn interviewed Welch regarding the contents of plaintiffs' affidavit, Welch had no recollection of having granted such consent. Welch later informed Lynn that any interest earned on his

money was insignificant. Plaintiff J.P. Schermerhorn testified at the hearing that his attorney, Welch, owned the money taken from the property management account to purchase the commercial paper in the company name and had given his oral consent to its use.

The Board found, and the circuit court affirmed, that this arrangement constituted a commingling of funds for the reason that J.P. Schermerhorn and Co. received interest income on money it did not own, that the persons whose money was invested were deprived of its use, and that plaintiffs meanwhile received the benefits of the interest income from the commercial paper investment as it was deposited into their company's operating account.

The Real Estate License Act provides that the Department of Registration and Education shall administer the Act. (Ill. Rev. Stat. 1987, ch. 111, par. 5808.) It also provides that a Real Estate Administration and Disciplinary Board be created and empowered to conduct hearings of alleged violations of the Act. (Ill. Rev. Stat. 1987, ch. 111, par. 5820.) The Board's findings are then presented to the Department for review and approval. A final decision of the Department is subject to judicial review pursuant to the Administrative Review Law. Ill. Rev. Stat. 1987, ch. 111, par. 5821.

In the present case, the Board found that plaintiffs violated section 18(e)(12) of the Real Estate License Act, which provides:

> "Section 18. The Department may refuse to issue or renew, may place on probation, may suspend or may revoke any license, or may censure, reprimand or impose a civil penalty not to exceed $10,000 upon any licensee hereunder for any one or any combination of the following causes: * * *
>
> (e) Where the licensee in performing or attempting to perform or pretending to perform any act as

> a broker or salesperson, or where such licensee, in handling his own property, whether held by deed, option, or otherwise, is found guilty of: * * *
>
> (12) Commingling the money or property of others with his own." (Ill. Rev. Stat. 1983, ch. 111, par. 5818.)

After consideration of the entire record, the Board found plaintiffs guilty of commingling funds held in trust with their own funds, and the circuit court upheld its decision.

The function of a reviewing court is limited to a determination of whether the administrative decision under review is against the manifest weight of the evidence. (*Davern v. Civil Service Commission* (1970), 47 Ill. 2d 469, 471, 269 N.E.2d 713, *cert. denied*, (1971), 403 U.S. 918, 29 L. Ed. 2d 695, 91 S. Ct. 2229.) An agency decision will not be disturbed unless an opposite conclusion is "clearly evident" from the evidence. *Rasky v. Department of Registration & Education* (1980), 87 Ill. App. 3d 580, 588, 410 N.E.2d 69, *appeal dismissed* (1981), 454 U.S. 806, 70 L. Ed. 2d 75, 102 S. Ct. 78, citing *Carrao v. Bd. of Education* (1977), 46 Ill. App. 3d 33, 40, 360 N.E.2d 536.

Plaintiffs initially identify our standard of review as whether "the defendants proved by a preponderance of the evidence that plaintiffs are guilty of commingling," arguing that there is no evidence to support the finding that they commingled the money of others with their own, and that the testimony of J.P. Schermerhorn that he never put his own money into the management account stands uncontradicted.

Second, plaintiffs assert that the record shows that a letter was sent by plaintiffs' attorney to each member of the Board hearing the case, specifically pointing out that commingling could not occur when the money was used to buy the commercial paper came out of the J.P. Scher-

merhorn & Co. management account, and the commercial paper was bought in that same name. Plaintiffs allege that because this argument was never answered, it stands admitted under Supreme Court Rule 341(e)(7). Ill. Rev. Stat. 1987, ch. 110A, par. 341(e)(7).

Third, plaintiffs contend that commingling cannot exist where there is a transfer of money within the same legal entity. Plaintiffs then list several factors which they claim show that only one legal entity existed. These facts include: (1) that the commercial paper was purchased by the J.P. Schermerhorn & Co. management account, and held by the same account; (2) that the $75,000 was carried as cash in the company's management account; (3) that J.P. Schermerhorn never put personal funds in the management account; and (4) that the $75,000 was always shown on the company's books as an asset of the management account.

Fourth, plaintiffs maintain that Welch's oral consent was sufficient to authorize the retention of the interest on the commercial paper by the corporation in a separate account, *viz.*, the operating account of the corporation.

We hold that the circuit court correctly affirmed the Department's decision. This issue in this court is not, as defendants would have it, whether "the defendants proved by a preponderance of the evidence that plaintiffs are guilty of commingling". Although this may have been defendants' burden at the hearing stage of the proceeding, the issue now, as we have previously noted, is whether the manifest weight of the evidence supports the Department's decision. (*Davern v. Civil Service Commission*, 47 Ill. 2d at 471.) Deference is to be given to the Department's decision, and it becomes plaintiffs' burden in this court to show that this decision is clearly erroneous. In order to set aside an agency decision, the reviewing court

must find that all reasonable and unbiased persons, acting within the limits prescribed by law and drawing all inferences in support of the finding would agree that the finding is erroneous. *Agans v. Edgar* (1986), 142 Ill. App. 3d 1087, 1093, 492 N.E.2d 929.

Plaintiffs' argument that J.P. Schermerhorn never put his own money into the management account is irrelevant. Defendants do not accuse plaintiffs of doing any such thing. The commingling in this case arose when plaintiffs took the interest from commercial paper purchased with funds belonging to their clients, and deposited that interest into a separate operating account used for the benefit of the corporation—an activity closely akin to conversion, if not arrant conversion itself.

Plaintiffs' second and third arguments, involving Welch's letter sent to the members of the Board and that commingling cannot exist where there is a transfer of money within the same legal entity are equally meritless. Especially pointless is plaintiffs' contention that the contents of the letter are admitted by the Department as true pursuant to Supreme Court Rule 341(e)(7) because the Department failed to respond to it. Supreme Court Rule 341(e)(7) provides that the points not argued in an appellant's brief are waived and cannot be argued in the reply brief, oral argument, or on petition for rehearing. (Ill. Rev. Stat. 1987, ch. 110A, par. 341(e)(7).) This rule is obviously unrelated to plaintiffs' contention.

Merely to juxtapose plaintiffs' arguments with the facts of this case is to lay bare their utter frivolity. The contents of the letter are not disputed and are clearly a matter of record. It states that the commercial paper was purchased with funds from the J.P. Schermerhorn management account, and that it was purchased in the company's name. This in no way changes the facts that the

$75,000 continued to be listed as cash in the management account, that the $33,000 in interest generated from the investment was appropriated by the corporation, and that plaintiffs failed to demonstrate that the affected clients consented to the arrangement. In fact, when asked about consent, the company first gave the Department a letter which stated that the interest from investing funds from the property management account would be used by the company to maintain a fund to be used for the payment of their clients' property taxes. Only later, when pressed for an exact breakdown of the ownership of the $75,000, did the company come forward with the allegation that the entire amount was owned by Welch, and that he orally consented to the arrangement. The company's "proof" of this is J.P. Schermerhorn's affidavit stating that it was so. Moreover, Lynn testified that Welch could not recall whether or not he gave permission for the retention of the interest. Lynn further testified that Welch later informed him that any interest involved was insignificant.

Indeed, it is quite evident that Welch plays a rather unusual part in these proceedings, so unusual in fact that we hereby order the Clerk of this Court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for the purpose of inquiring into whether there is involved here any contravention on his part of our Code of Professional Responsibility. (Ill. Rev. Stat. 1987, ch. 110A, article VIII.) At any rate, the Department having weighed the evidence and having adjudged the credibility of the witnesses, we find that the manifest weight of the evidence clearly supports the Department's decision. Accordingly, we affirm the circuit court's decision.

AFFIRMED.

HARTMAN, J., and DiVITO, J., CONCUR.

APPENDIX B

Resume of the Record Showing Certain Facts of the Instant Case

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 88-852

J.P. SCHERMERHORN, et al.,

Plaintiffs-Appellants,

vs.

ILLINOIS DEPARTMENT OF
REGISTRATION & EDUCATION, et al.,

Defendants-Appellees.

FACTS AS SHOWN IN THE RECORD

FIRST FACT: PLAINTIFF'S ATTORNEY R.S. WELCH OWNED THE $75,000.00 USED TO PURCHASE THE CERTIFICATE.

1. J.P. Schermerhorn so testified (R. 181 and 182 lines 4-10) and this testimony never contradicted.

2. J.P. Schermerhorn said he wrote Ross S. Welch he was investing his money. R. 129-130.

3. J.P. Schermerhorn said the $75,000.00 belonged to Ross S. Welch. R. 128 line 14.

4. Mr. Goldberg, Defendants' Attorney, admits the $75,000.00 belonged to Ross S. Welch. R. 150 line 16. That there can be no doubt on who owned the $75,000.00 can be seen from:

(a) Defendants in their own brief (pages 3 and 4) argue "J.P. Schermerhorn testified that his Attorney, Ross S. Welch, owned the money used from the property management account to purchase the commercial paper in the company name and had given oral consent to its use." R. 153.

(b) Defendants' witness, Mr. Lynn, did not question the fact that Ross S. Welch owned the $75,000.00 and may have consented to its use. (R. 128, 129, 150 & 55).

SECOND FACT: ROSS S. WELCH CONSENTED TO SUCH USE OF THE $75,000.00 AND PLAINTIFFS KEEPING THE INTEREST GENERATED.

1. J.P. Schermerhorn testified his Attorney, Ross S. Welch, was the owner of the $75,000.00 in January, 1980 and consented to Plaintiffs so investing the money and to Plaintiffs keeping the interest. R. 116, 117, 118.

2. Above testimony stands unrebutted. J.P. Schermerhorn in testifying reads from Ross S. Welch's October 1984 letter saying, in and around January, 1980, Welch was told by Schermerhorn he was collecting interest on Welch's money and that Welch did not object to such practice if it did not endanger his principal or Schermerhorn's ability to pay monies due Welch when they became due. R. 181.

3. J.P. Schermerhorn testified he told Ross S. Welch he was keeping the interest earned by the $75,000.00. R. 129, 130.

4. Defendants' witness Lynn admits Welch may have consented to the investment and to plaintiffs keeping the interest. R. 55.

Above second fact must be true for Defendants on the top of page four of their Brief argue and contend that Welch consented to such use of the $75,000.00. Page 4 of Defendants' Brief.

THIRD FACT: THAT THE $75,000.00 CERTIFICATE INVOLVED HEREIN WAS PURCHASED ON APRIL 11, 1980 BY THE J.P. SCHERMERHORN & CO. MANAGEMENT ACCOUNT AND ISSUED IN THE NAME OF AND HELD BY J.P. SCHERMERHORN & CO. MANAGEMENT ACCOUNT.

1. Schermerhorn testified the $75,000.00 certificate was purchased by J.P. Schermerhorn & Co. management account (R. 109) and paid for by management account check dated April 11, 1980 for $75,000.00, all as shown by Banks letter admitted in evidence (as no objections by Defendants) R. 112, showing the management account paid for the purchase and it received the $75,000.00 certificate; Defendants' witness Lynn found it shown as an asset of the J.P. Schermerhorn & Co. management account when he examined that account on August 8, 1983 (R. 51).

2. See Record 428, 429 and 2 page Exhibit A attached to Plaintiff's Reply Brief showing $75,000.00 certificate paid for by J.P. Schermerhorn & Co. management account on April 11, 1980 [this agrees with Defendants' witness Mr. Lynn (see Record 72 line 20) and that such certificate was delivered to J.P. Schermerhorn & Co. management account; and such $75,000.00 was still held in the management account some 3 years later, says Defendants' witness Lynn. R. 51.

3. Defendants' witness Lynn says J.P. Schermerhorn & Co. management account check for $75,000.00 dated April 10, 1980, was used to initially purchase the $75,000.00 in paper. (R. 49 and 50).

/s/ Ross S. Welch
Plaintiff's Attorney

ROSS S. WELCH
135 South LaSalle Street
Chicago, Illinois 60603
(312) 845-2908

APPENDIX C

Changes in Illinois Statute After Petitioners Purchased the $75,000 in Commercial Paper

PRESENT WORDING OF CHAPTER 111, SECTION 5818-(e)-8, REAL ESTATE LICENSE ACT OF 1983 EFFECTIVE JANUARY 1, 1984.

8. "Failure to maintain and deposit in a special account, separate and apart from a personal or other business account, all moneys belonging to others entrusted to the licensee while acting as a broker, or as escrow agent, or as the temporary custodian of the funds of others until the transaction involved is consummated or terminated; such account shall be noninterest bearing unless the character of the deposit is such that interest thereon is otherwise required by law, or unless written agreement of the principals to the transaction requires that the deposit be placed in an interest bearing account;"

PREVIOUS WORDING OF REAL ESTATE BROKERS REGISTRATION ACT OF 1921 CHAPTER 111 ILL. REV. ST. 1979, PARAGRAPH 5732-15-e-8 IN EFFECT ON APRIL 11, 1980 AND LATER REPLACED BY REAL ESTATE LICENSE ACT OF 1983, EFFECTIVE JANUARY 1, 1984

8. "Failure to maintain and deposit in a special account, separate and apart from a personal or other business account, all moneys belonging to others entrusted to the licensee while acting as a broker, or as escrow agent, or

as the temporary custodian of the funds of others until the transaction involved is consummated or terminated; such account shall be noninterest bearing unless the character of the deposit is such that interest thereon is otherwise required by law, or unless the principal specifically requires that the deposit be placed in an interest bearing account."

APPENDIX D

Order Denying Motion For Leave To File A Motion For Reconsideration

No. 69251

SUPREME COURT
STATE OF ILLINOIS

J.P. Schermerhorn, et al.,

Petitioners

vs.

Illinois Department of Registration & Education, et al., etc.,

Respondents

Appeal From Appellate Court
First District 1-88-0852

ORDER

This matter coming on to be heard upon the motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal, notice having been served upon all parties and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the motion is *DENIED*.

Filed January 16, 1990
Supreme Court Clerk

APPENDIX E

Order Denying Petition for Leave to Appeal

STATE OF ILLINOIS
SUPREME COURT

* * * * *

On the fifth day of December, 1989, the Supreme Court entered the following judgment:

No. 69251

J.P. Schermerhorn, J.P. Schermerhorn & Co.,

Petitioners,

v.

Illinois Department of Registration & Education, Gary L. Clayton, Director of the Department of Registration and Education, State of Illinois,

Respondents.

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

* * * * *

APPENDIX F

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 88-852

J.P. SCHERMERHORN,
SCHERMERHORN & CO.,

Plaintiffs-Appellants,

v.

ILLINOIS DEPARTMENT OF
REGISTRATION & EDUCATION,
Gary L. Clayton, Director of
the Department of Registration
and Education, State of Illinois,

Defendants-Appellees.

ORDER

Plaintiff-Appellant's Petition for Rehearing is hereby denied.

/s/ Allen Hartman
ALLEN HARTMAN, J.

/s/ Anthony Scariano
ANTHONY SCARIANO, J.

/s/ Gino L. DiVito
GINO L. DiVITO, J.

Dated: August 15, 1989